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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921

No. 450

NORTH GERMAN LLOYD, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JUNE 25, 1921

(30,445)

(30,445)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 480

NORTH GERMAN LLOYD, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

INDEX

	Original	Print
Record from Court of Claims	1	1
History of proceedings	1	1
Amended petition	1	1
Defendant's demurrer	13	7
Argument and submission of demurrer	13	7
Order of court dismissing amended petition with memorandum by the court	13	7
Opinion of the court referred to in court's memorandum	14	8
Plaintiff's application for appeal	21	15
Order of court allowing said application	21	15
Clerk's certificate	22	15

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 23, 1924

[fol. 1] COURT OF CLAIMS OF THE UNITED STATES

No. C 312

NORTH GERMAN LLOYD

vs.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

On April 5, 1923, the plaintiff filed its original petition.

On May 26, 1923, the defendant filed a demurrer to said petition.

Subsequently, to wit, on February 19, 1924, by leave of court, the plaintiff filed an amended petition. Said amended petition is as follows:

II. AMENDED PETITION

To the Honorable the Court of Claims:

The claimant, North German Lloyd, respectfully represents:

1. That it is, and was at all times hereinafter mentioned, a corporation organized and existing under and by virtue of the laws of the Free and Hanseatic City of Bremen in Germany, and of Germany, named and known in the German language as Norddeutscher Lloyd and in the English language as North German Lloyd, and is, and was at all the times hereinafter mentioned, a citizen or subject of the German Government.

2. That the German Government accords to citizens of the United States the right to prosecute claims against it in its courts.

[fol. 2] 3. That continuously from the year 1857 to about the end of the month of July, 1914, claimant maintained regular steamship services between its home port of Bremen and other foreign ports and the port of New York in the United States of America, which services were interrupted at the time last mentioned by the outbreak of war between Germany and other European powers.

4. That on April 6, 1917, claimant was the owner and in possession of certain personal property, acquired and used by it in connection with its aforesaid steamship business, and then located in, upon and about certain piers, docks, wharves (and the waters surrounding the same) situate on the Hudson River in the City of Hoboken, County of Hudson and State of New Jersey, owned by the North German Lloyd Dock Company, a corporation of the State of New Jersey, and of which claimant was then in possession as lessee; and which property was, at or during the times hereinafter stated, expropriated by the United States of America, acting by and through the War

Department and the military forces, under authority of the Act of Congress of August 29, 1916, c. 418 §1, (39 Stat. 645), in the manner hereinafter set forth, and taken out of the possession and ownership of claimant and into the possession and ownership of the United States of America.

5. That for purposes of convenience in stating this claim said personal property may be divided into six categories, described and identified as follows:

[fol. 3] The First Category.—This consists of property expropriated as a result of selections made by appraisers acting for the United States Army in April and May, 1917, and is composed of a large number of items of property of the following general character: office furniture, ships' furnishings and supplies; tools and movable equipment and appliances and cargo gear; timber, lumber, articles of iron and steel, and other materials, for repair of piers and pier equipment and ships; machine shop tools and supplies; blacksmith shop tools and supplies; electric and oil lighting supplies; carpenter shop tools and supplies; rope, cotton waste, coal and coal gear; paint shop tools and supplies; sail maker's shop tools and supplies; and miscellaneous movable property used and useful in the operations incident to maintaining said piers and loading and discharging vessel thereat. The items comprised in this category listed in an inventory, made up and signed by representatives of claimant and of the United States acting jointly.

The Second Category.—This consists of property similar in character to that comprised in the First Category, and the articles comprised herein were taken into possession by the United States of America in April and May, 1917, and have ever since been held by it, but were not expropriated until a later date, which claimant cannot fix more certainly than to say that it was not later than June 26, 1918, on which date the property comprised in this category was added by the United States of America to the inventory mentioned in describing the First Category.

[fol. 4] The Third Category.—This consists of property similar in character to that comprised in the First and Second Categories and was expropriated on May 28, June 8 and June 25, 1917, and on June 26, 1918, was added to the inventory before mentioned.

The Fourth Category.—This consists of sail maker's shop stores, paint shop stores and articles contained in baggage store room. These goods were all taken into possession by the United States of America on April 6, 1917, and detailed lists of them are contained in the inventory above mentioned, set forth under a separate heading which states that the "lists were canvassed Thursday, March 21" (no year stated), by representatives of the claimant and of the United States of America. Claimant is not informed of the date upon which the goods were expropriated by the United States of America.

The Fifth Category.—This consists in part of cargo taken from North German Lloyd vessels and in part of property similar in character to that comprised in the First, Second, Third and Fourth Categories, and was taken into possession by the United States of America in April and May, 1917, and on June 26, 1918, was added by the United States to the inventory before mentioned.

(The items comprised in the foregoing five categories are very numerous. They are set forth in full in the inventory above mentioned, duplicate originals of which, as claimant is informed and believes, are in possession of the War Department and Navy Department and also of the Alien Property Custodian, and claimant, in lieu of setting forth said inventory in full in this petition, refers to the [fol. 5] same and makes profert of a duplicate original thereof given claimant by the United States of America.)

The Sixth Category.—This consists of the following property expropriated on or shortly after April 6, 1917, and not included in the above mentioned inventory, namely: equipment for fire protection, 1 new fire pump not yet installed, 460 differential tackles for doors, 37 electric winches, tug boat "Pollux" including equipment, coal hoister "Vulkan" including equipment, coal hoister "Jupiter" including equipment, ash boat No. 1 including equipment, ash boat No. 2 including equipment, 19 floating fenders and 2 floats.

6. The value of the property expropriated as aforesaid is as follows:

First Category.—This was valued by the United States of America, as appears from the above-mentioned inventory, at the aggregate sum of $25,330.85 and was valued by claimant at the aggregate sum of $34,709.26, which last mentioned sum claimant alleges to be the true value of said property at the time of the expropriation thereof.

Second Category.—This was valued by the representatives of the United States of America and of claimant, acting jointly, at the aggregate sum of $26,303.08, subject to the following notation entered on said inventory: "Note:—Values entered against items are not conclusive; they are merely to be used as a guide for identification in connection with the locations shown." Claimant alleges, however, that said sum of $26,303.08 is the true value of said property at the time of the expropriation thereof.

[fol. 6] Third Category.—This was valued by the representatives of the United States of America and of claimant at the aggregate sum of $672, which sum claimant alleges was the true value of said property at the time of expropriation thereof.

Fourth Category.—The inventory above mentioned states the value of the goods comprised in this category at the aggregate sum of $17,579.90, which sum claimant alleges was the true value of the said property at the time of the expropriation thereof.

Fifth Category.—Claimant alleges that the true value of the property comprised in this category at the time of expropriation was the sum of $7,110. So far as claimant knows this property was not valued by the United States of America.

Sixth Category.—Claimant alleges that the true value of the several items comprised in this category at the time of expropriation thereof was as follows:

Equipment for fire protection	$2,697.50
1 new fire pump not yet installed	2,420.00
460 differential tackles for doors	18,080.00
37 electric winches	32,100.00
Tug boat "Pollux" including equipment	16,000.00
Coal hoister "Vulcan" including equipment	2,624.00
Coal hoister "Jupiter" including equipment	1,820.00
Ash boat No. 1 including equipment	515.00
Ash boat No. 2 including equipment	615.00
19 floating fenders	1,500.00
2 floats	250.00
Making a total of	$78,621.50

[fol. 7] 7. That no compensation has at any time been awarded or paid to claimant by the United States of America for or in respect of any of the property in any of the categories mentioned in this amended petition.

8. That with respect to the property comprised in the First, Second, Third, Fourth and Fifth Categories, a certain memorandum concerning the same was, on or about June 26, 1918, drawn up by the representatives of the United States of America and signed by them and a representative of claimant and attached to the inventory herein-before mentioned. The following is a true copy of said memorandum and of the signatures thereto:

"At a meeting held at the office of The New York Trust Company, at No. 26 Broad Street, New York City, on June 26, 1918, at ten A. M., at which were present Mr. Frank E. Williamson, representing the North German Lloyd; Mr. G. Friedrichs, former Chief Dock Clerk, of the North German Lloyd; Messrs. Otto T. Bannard, Morgan M. Mann and Gilbert S. McClintock, representing the Alien Property Custodian; Col. A. C. Blunt, U. S. A.; Col. F. H. Schoeffel, U. S. A., and Paymaster J. Lyman Pratt, U. S. Navy, comprising the joint Board of the War and Navy Departments, respectively, and Captain Lawson Sandford, Asst. to the General Superintendent, Army Transport Service, New York, there was submitted an inventory showing the quantities and articles of movable property, material, gear and supplies owned by the North German Lloyd, for which the Army is considered responsible, as a result of the se-
[fol. 8] lections by the Appraisers for the Army in April and May, 1917. This was marked for identification by Mr. Bannard, Col. Blunt, Paymaster Pratt and Mr. Friedrichs.

"There was added to this inventory, similarly marked for identification, a group of North German Lloyd property of similar type, which the Appraisers had not recommended in April and May, 1917, but which was retained in Army possession, and is recommended to be incorporated as a part of the inventory aforesaid.

"To complete the responsibility and record of the Army, there was also added for record certain items of office furniture which the Army subsequently acquired from the North German Lloyd, likewise similarly marked for identification.

"The three groups shall be combined, written out and shall constitute the official inventory and record of all the movable property of the North German Lloyd in the hands of and chargeable to the War Department at its Hoboken Piers on April 17, 1917, and shall be executed by the representatives of the several interests concerned. This procedure was agreed to by all present, and the question of values was not raised.

"Separate and apart from this settlement is involved the determination of responsibility for certain miscellaneous property of the North German Lloyd (mainly ex ships) reposing on April 17, 1917, in certain rooms on the upper deck of the bulkhead building. The matter is under adjustment in respect to the present location and identification of this miscellaneous property, and if it is not accounted for or turned over to Mr. Bannard, Alien Property Custodian, to his satisfaction, the Joint Army and Navy Board, hereby [fol. 9] decide to recommend to the War Department that the responsibility rests upon the War Department. To establish the record a special supplement to the main inventory determined above shall be written and executed forthwith in similar manner.

"It is agreed that the North German Lloyd and not the North German Lloyd Dock Company was the owner of all the property referred to.

(Sgd.) Otto T. Bannard, for Alien Property Custodian. A. C. Blunt, Lt. Col. U. S. A., for U. S. Army. Frank E. Williamson, Attorney for North German Lloyd."

A duplicate original of said memorandum and inventory was given to claimant and, as claimant believes, other duplicate originals were retained by the United States of America.

9. That claimant hereby claims from the United States of America, as the true and reasonable value of its property expropriated as herein stated, the sum of $164,995.74, being the aggregate of the values assigned by claimant to the property described in the foregoing six categories.

10. That this suit is founded upon:

(a) The Constitution of the United States of America.

(b) The Act of Congress of Aug. 29, 1916, c. 418, §1, (39 Stat. 645).

[fol. 10] (c) An implied contract with the Government, arising out of the facts herein stated, to make compensation for the value of claimant's property herein described, expropriated by the United States of America for its use.

(d) A claim, not sounding in tort, for unliquidated damages for the reasonable value of claimant's property, hereinbefore mentioned, expropriated by the United States of America for its use.

(e) An express contract with the Government for the payment of the reasonable value of the said property expropriated by the United States of America; said contract being evidenced by the memorandum concerning said property, signed by the representatives of the Government acting in that behalf, which is set forth in full in paragraph 8 hereof.

11. That no action has been had on this claim in Congress; that no action has been had hereon by any of the Departments, except such action as is evidenced by the memorandum concerning claimant's property which is set forth in paragraph 6 hereof; that the claimant, North German Lloyd, is the sole owner of this claim and no other person or corporation is interested therein; that no assignment or transfer of this claim, or *if* any interest therein, has been made; that claimant is justly entitled to the amount herein claimed from the United States of America after allowing all just credits and off-sets; that claimant has not in any way voluntarily aided, abetted or given encouragement to rebellion against the United [fol. 11] States; and that claimant (and its agent executing this amended petition in its behalf) believes the facts as stated in this amended petition to be true.

12. That neither claimant nor any assignee of claimant has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States, which suit or process is based upon the facts herein stated or any of such facts, or has reference to the subject-matter of this amended petition.

13. That the original petition herein was filed in the Court of Claims within six years after the claims herein set forth first accrued.

14. That this amended petition is signed by claimant's duly appointed attorney of record, and, claimant being a body corporate, is also signed and verified in its behalf by its general agent and attorney in fact in the United States thereunto duly authorized, and claimant makes profert of its said agent's power of attorney authorizing him to act in its behalf, and makes reference to a true copy of said power of attorney which is annexed to and made part of the original petition filed herein as aforesaid.

North German Lloyd, Claimant. Heinrich Schuengel, General Agent and Attorney in Fact. Edgar W. Hunt, Attorney of Record.

[fol. 12] Jurat showing the foregoing was duly sworn to by Heinrich Schuengel omitted in printing.

[fol. 13] DEFENDANT'S DEMURRER—Filed May 26, 1923

(NOTE.—This demurrer was allowed to stand to the Amended Petition.)

Defendant demurs to the petition in the above entitled case for the reason that it does not state a cause of action against the United States.

Robert H. Lovett, Assistant Attorney General. W. F. Norris, Attorney.

IV. ARGUMENT AND SUBMISSION OF DEMURRER

On February 18, 19 and 20, 1924, the demurrers in this and similar cases, were argued by Messrs. W. F. Norris and Herman J. Galloway, for the defendants, and by Mr. Edgar W. Hunt, on February 19, for the plaintiff in this case, and the demurrer was submitted.

V. ORDER OF COURT DISMISSING AMENDED PETITION, AND MEMORANDUM—Entered March 17, 1924

This case was submitted upon the defendant's demurrer to the plaintiff's petition as amended. On consideration whereof, the court being of opinion that the demurrer is well taken, it is adjudged and ordered this 17th day of March, 1924, that the said demurrer be and the same is sustained, and the amended petition is dismissed.

MEMORANDUM

The court decides it is without jurisdiction to hear and determine this case. Reference is made for its reasons to the court's opinion in Deutsch-Australische Dampschiffs-Gesellschaft, No. C-576, decided March 17, 1924.

[fol. 14] VI. Opinion of the Court Referred to in Court's Memoradum—Decided March 17, 1924

No. C-576

Deutsch-Australische Dampfschiffs-Gesellschaft

v.

The United States

Campbell, Chief Justice, delivered the opinion of the court:

This case is before the court upon the defendant's demurrer to the petition, which in substance avers: Plaintiff is a corporation organized and existing under the laws of Germany, and is a citizen of Germany, and at the times mentioned in the petition was engaged in the business of operating steamships, of which it was the owner of many, its principal office and place of business being at Hamburg, Germany. In or about the month of May or June, 1917, pursuant to authority granted by the joint resolution of May 12, 1917 (hereinafter set forth), the President of the United States "took over to the United States the immediate possession and control" of the plaintiff's steamers which then were within the jurisdiction of the United States or its insular possessions and which were the sole and exclusive property of plaintiff and in its possession. The names of the six steamers and the alleged fair and reasonable value of each is stated, and the aggregate value was $9,022,000.

Also it is alleged that certain stores and equipment belonging to the several steamers were also taken over, and that by the taking over of the possession and control of the steamers in the manner stated and "thus appropriating the said steamers to its own use, enjoyment, and benefit," the United States impliedly agreed with plaintiff to pay plaintiff the fair and reasonable value of said steamers, and also for their stores and equipment, but that they have wholly failed and refused to pay the same. It is further averred that the survey required by section 2 of the joint resolution has been duly made and report thereof filed with the Secretary of the Navy. The claim is for the alleged aggregate value of the steamers besides the value of their coal, stores and equipment. A further claim of $10 per deadweight ton per month for each steamer as the value of its use is made in the petition, but the plaintiff abandoned this claim, insisting, however, upon the alleged value of its property. It was explained in argument that the several steamers, with the exception of those in Cuban harbors, were all in American harbors at the outbreak of the war. They were merchant vessels which had sought asylum in these harbors and were left unmolested until the United States entered the war. There were fifteen other suits involving vessels of the alleged aggregate value of over $30,000,000 submitted with this one, besides a large number of similar cases heard at the same time.

[fol. 15] On April 6, 1917, the Congress adopted the joint resolution declaring the existence of a state of war between the United

States and the Imperial Government of Germany. On that day some of the vessels in question were taken into possession and control by agents of the United States Government. On May 12, 1917, the Congress adopted a joint resolution as follows:

"Chap. 13. Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, orsubject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

By proclamation dated June 30, 1917, which incorporated the joint resolution of May 12 and mentioned by name 69 German ships, it was ordered by the President that "through the United States Shipping Board there be taken over to the United States the possession and title of the aforementioned vessels. The United States Shipping Board is further hereby authorized to repair, equip, and man the said vessels; to operate, lease, or charter the same in any service of the United States or in any commerce, foreign or coastwise; and to do and perform any and all things that may be necessary to accomplish the purposes of the joint resolution above set forth."

A question president at the threshold is whether the Court of Claims has jurisdiction in the premises. The plaintiff contends that the allegations bring its case within the scope of section 145, Judicial Code, conferring power to hear and determine claims founded

upon the Constitution or any law of Congress, or upon implied contract with the United States. The action is not founded upon the Constitution or a law of Congress. The joint resolution authorized the President to take title to the vessels and he did so. It does not in terms declare a liability of the Government or of itself create a right in plaintiff. It was said by Judge Richardson in Ludington's case, 15 C. Cls. 453, that to sustain a claim as one founded on a law of Congress there must be "a statute liability on the part of the Government." See Hukill case, C. Cls. 562. In Hvoslef case, 237 [fol. 16] U. S. 1, 11, the statute authorized and directed the payment of certain claims. The act construed in the Medbury case, 173 U. S. 492, created the right to payment.

Where suits for compensation have been maintained because of the taking by the Government of private property for public use they were not founded upon the Constitution or the Fifth Amendment or a law of Congress, but upon an implied contract arising out of the circumstances of the taking. In United States v. Great Falls Mfg. Co., 112 U. S. 645, one of the earliest cases on the subject, the principle was announced, and it has been repeatedly reaffirmed. In United States v. North American Transportation & Trading Co., 253 U. S. 330, 335, it was said: "The right to bring this suit against the United States in the Court of Claims is not founded upon the Fifth Amendment, but upon the existence of an implied contract entered into by the United States." See Tempel case, 248 U. S. 121, 129; Peabody case, 231 U. S. 530, 539; Klebe case, — U. S. —, decided November 12, 1923 (57 C. Cls., 160). The circumstances of the case may rebut the implication of such a contract. Horstmann case, 257 U. S. 138, 146; Ball Engineering Co. v. White & Co., 250 U. S. 46, 57; Klebe Case, supra.

It was the action taken in virtue of the joint resolution that deprived plaintiff of its property, and the question is whether the circumstances gave rise to the implication of a contract of which the Court of Claims has jurisdiction. Manifestly the joint resolution was an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water. Art. 1, § 8, cl. 11. See Stoehr v. Wallace, 255 U. S. 239, 242; Commercial Trust Co. v. Miller. 262 U. S. 51; Brown v. United States, 8 Cranch 110, 126; Miller v. United States, 11 Wall. 268, 305; Fischer v. Palmer, 259 Fed. 355. Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852. Several of these cases deal with the trading with the enemy act, but that act granted broad powers to the Alien Property Custodian in dealing with enemy property, and if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this court.

In Brown v. United States, 8 Cranch 110, the Circuit Court had condemned certain pine lumber seized as enemy property. The court's action was sought to be sustained upon the mere fact of the declaration of war. This the Supreme Court said was not sufficient,

but that legislative action was essential to confer upon courts authority to condemn enemy property. Chief Justice Marshall said, page 122: "That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but can not impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court." The court could not pronounce a sentence of condemnation in the absence of legislative authority so to do. In the instant case the [fol. 17] court is asked to order compensation for enemy property seized by authority of a legislative act that is silent on the question of jurisdiction. As already stated, the taking of private property for public use by the Government, and for which the Fifth Amendment requires compensation to be made, falls within the class of claims founded upon implied contract, and the duty imposed by this amendment is an essential element in raising the necessary implication of an agreement to pay.

But the limitations or restrictions of the Fifth Amendment do not affect the exercise of the war power conferred upon Congress when enemy property is taken. It was said in Miller v. United States, 11 Wall. 268, 304, that where the statutes were "an exercise of the war powers of the Government, it is clear they are not affected by the restrictions imposed by the Fifth and Sixth Amendments." (See Herrera case, 222, U. S. 558, 572.) It was added: "The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right." See Morrisdale Coal Co. Case, 55 C. Cls., 310, 315; Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852, 858; Fischer v. Palmer, 259 Fed. 355, 358.

In Green's Case, 10 C. Cls. 466, the facts were that the plaintiff, a citizen of the United States, was domiciled in Nashville Tennessee. On the 16th day of February, 1862, while the capture of Nashville by the United States Army was imminent and expected, plaintiff went south with a large amount of his firm's moneys, which he took for investment. "While absent from his residence, he was not engaged in giving aid or encouragement to he rebellion, other than such as might arise from his voluntarily leaving his domicile and remaining within the Confederate lines and having commercial dealings with the people." When he left Nashville he was the owner of certain rent-producing buildings occupied by tenants and left in

charge of his agent. The agent continued to collect the rents and care for the buildings until December, 1864, when they were seized by the special supervising agent of the Treasury as abandoned property, who collected the rents until July 8, 1865. The suit brought in October, 1870, was to recover these rents. The authority for taking the property was the act of July 2, 1864, 13 Stat. 375, which did not in terms prescribe a remedy. The opinion of the court, delivered by Judge Nott, says that "the case presents, with unusual clearness, the question whether the Government is judicially liable for any of the war measures restorted to in the late rebellion other than the liability created by the abandoned or captured property act," and states the question to be whether the Government is liable for the acts of its officers, done under color of its authority within the insurrectionary district, where the party injured was loyal and the circumstances were such as would give a citizen in time of peace a right of action against the Government under the mandate of the Constitution that private property should not be taken for public [fol. 18] use without just compensation. Declaring that it made no difference in the applicable rule whether the property was taken by the Army or the Navy, or by an officer of the Treasury, the court concluded that the Government was not liable upon implied contract. The court said (p. 471): "It is inevitable that a war must be prosecuted rigorously, and it is desirable that it be prosecuted as little to the injury of a government's own citizens as possible. In the prosecution of a war the discretion of a government, so far as the enemy is concerned, takes the place of ordinary constitutional restrictions or statutory provisions."

To relieve the rigor of the situation, the act of March 12, 1863, commonly called the abandoned or captured property act, was enacted. It was a beneficent piece of legislation, and, speaking of it, the court say- in Klein's Case, 13 Wall. 128, 138: "There is, so far as we are aware, no similar legislation mentioned in history." It created a right where none existed before, Anderson Case, 9 Wall. 56, and authorized suits under specified conditions for the proceeds of sales of property that had been taken or seized as "enemy property." Although it was recognized, as was said in Lamar v. Brown, 92 U. S. 187, 195, that the United States, during the Civil War, occupied the position of "both belligerent and constitutional sovereign," it was also recognized, and uniformly held, that it was only in virtue of the act mentioned that even the loyal citizen, whether he resided in the one or the other of the sections, could assert in the Court of Claims compensation for his property that had been seized or appropriated as enemy property. The theory of an implied contract arising out of such seizure or appropriation finds no support in the decided cases. In Young's Case, 97 U. S. 39, 67, it was said of the British subject, in whose right the suit was brought: "Collie has been deprived of no right he ever had. Neither he nor any one similarly situated has ever been permitted to sue the United States in their own courts upon such a claim." See Klein Case, 13 Wall. 128, 137; Moore Case, 10 C. Cls. 375, 383; Haycraft Case, 22 Wall. 81, 92; Hijo Case, 194 U. S. 315.

In the Herrera Case, 43 C. Cls. 430, the plaintiff insisted that there was an implied contract, but this court held it had not jurisdiction under the Tucker Act, and quoted from the Hijo Case, 194 U. S. 315, 320, where it is said: "The vessel was therefore to be deemed enemy's property. It was seized as property of that kind, for purposes of war and not for any purposes of gain." The judgment was affirmed by the Supreme Court. In the course of their opinion, reference is made to the modern rules of war, stated by Kent (1 Kent, 92, 93), and which are in substance urged here, and the opinion proceeds: "If the record presented such a case, the question could be raised whether it presented one for judicial cognizance, even if a court could share the indignation which the learned commentator says all mankind would feel. It is certain that the court's power can not be enlarged by its emotions." Herrera Case, 222 U. S. 558, 572.

The second section of the resolution directed that a survey be made, the results of which should be competent evidence in any proceedings for compensation. The provision is entirely consistent with the idea that Congress intended to reserve for future determination any question of compensation. It falls short of conferring [fol. 19] power upon this court to determine it. It is significant when the policy of legislation during the war is considered that provision was made for action against the Government in all cases where it was intended to confer the right. Notwithstanding this court had the power to hear and determine suits against he Government conferred by section 145 of the Judicial Code, the numerous statutes authorizing requisitions and the taking of private property expressly designated the court where suits could be brought. Some of these conferred jurisdiction on the Court of Claims; some on District courts, and some on both of these courts. Mr. Justice Brandeis, in the Pfitsch case, 256 U. S. 547, 552, says: "A survey of the war legislation permitting the seizure of property discloses that Congress has established three distinct jurisdictions for the purpose of suit against the United States for compensation." He mentions 25 different instances. The Government can not be sued without its consent, and the power to hear and determine suits against the United States should not and does not rest in mere inference or implication. It was said in Haycraft's case, 22 Wall. 81, 92: "A sovereign can not be sued in his own courts except with his consent. This is an action against the United States in its own Court of Claims. The appellant must, therefore, show that consent has been given to its prosecution." Every court must take notice of the limits of its jurisdiction. Reid case, 211 U. S. 529. It was suggested in argument in some of this class of cases that the Government took charge of the railroads under provisions of the national defense act, which did not prescribe a method for ascertaining compensation. But this action taken in an emergency was followed by a statute, which provided the necessary forum. The trading with the enemy act authorizing the Alien Property Custodian to take over and to dispose of enemy property did not permit suits by the enemy owners. Nor does the joint resolution of May 12 authorize suits by

the German owners of the vessels. If this resolution can be made the basis of the suits they could have been instituted as soon as the President took action under it. Can it be supposed that the Government intended to open its courts to enemies seeking compensation for property taken from them while the war was yet flagrant? The history of the enactment rebuts any such idea. A joint resolution was introduced and referred in the Senate and in the House. As reported to the Senate by its committee, the joint resolution contained five sections. (Cong. Rec., vol. 55, pt. 2, p. 1572.) The first two sections contained all that was finally adopted. The three other sections purported to authorize suits to be brought by parties interested in the vessels and had provisions relative to suits. By section 5 the suits could be brought in the Court of Claims. All of sections 3, 4, and 5 thus reported were stricken out by amendment in the Senate. (Cong. Rec., vol. 55, pt. 2, p. 1575.) An amendment proposed by Senator Knox authorizing the President to "requisition" the vessels was voted down. (Cong. Rec., vol. 55, pt. 2, pp. 1575, 1576.) The joint resolution as amended was adopted by the Senate, and in that shape was sent to the House, where it was taken up, superseding the one on its calendar, and passed as it came from the Senate. This definite action by the Senate, concurred in by the House, confirms the view that there was no intention to authorize [fol. 20] suits in the Court of Claims on account of the seizure of these vessels. See Pfitsch case, supra.

The plaintiff argues that the United States did not confiscate or intend to confiscate the property and that the taking must consequently be referred to the power of eminent domain with a duty to make compensation. What we have said sufficiently answers this contention. We do not think it necessary to assert that there was a confiscation, nor to deny that the Congress may have intended that the United States would at some time account for the vessels or their ascertained value. If this court is without jurisdiction, its conclusions upon these questions would probably be coram non judice. The result, however, in this case, would not be altered if the proper conclusion were that the taking over of the vessels amounted to a sequestration of them. The act authorizing their seizure did not confer power on the Court of Claims to entertain the present suit, nor does its general jurisdiction extend to suits of this kind. It was said in Haycraft's case, supra: It is for Congress, not the courts, to determine whether this jurisdiction shall be extended and other remedies provided."

The demurrer should be sustained. And it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Booth, Judge, concur.

[fol. 21] VII. PLAINTIFF'S APPLICATION FOR AND ORDER ALLOWING APPEAL—Filed June 3, 1924

From the judgment rendered in the above-entitled cause on the 17th day of March, 1924, in favor of the defendant, the claimant, by its attorney, on this 3rd day of June, 1924, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

Edgar W. Hunt, Attorney for Claimant.

Ordered: That the above application for appeal be allowed as prayed for.

By the Court.

Entered June 16, 1924.

[fol. 22] COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of the case on demurrer; of the order of the court dismissing the amended petition, with memorandum by the court; of the opinion of the court referred to in court's memorandum; of the plaintiff's application for an appeal and of the allowance by the court of said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this Twentieth Day of June, A. D. 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal Court of Claims.)

Endorsed on cover: File No. 30,445. Court of Claims. Term No. 480. North German Lloyd, appellant, vs. The United States. Filed June 25th, 1924. File No. 30,445.